

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC. APPLICATION No. 1851 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE K.J.VAIDYA

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1. Whether Reporters of Local Papers may be allowed to see the judgement ? YES
2. To be referred to the Reporter or not ? YES

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3. Whether Their Lordships wish to see the fair copy of the judgement? NO
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder ? NO
5. Whether it is to be circulated to the Civil Judge ? YES

DIPENDRA G CHOKSI & ANR.

Versus

DIPAK CHIMANLAL PATEL

Appearance:

MR AS KOTHARI for Petitioners
MR SV RAJU for Respondent No. 1
MR.DN PATEL, APP for Respondent No. 2

CORAM : MR.JUSTICE K.J.VAIDYA
Date of decision: 07/01/97

ORAL JUDGEMENT

"Whether in cases wherein the allegations made in the complaint filed by a Drawee of the cheque against the drawer under section 138 of the Negotiable Instruments

Act, 1881, also further discloses the material ingredients which prima facie do constitute an offence punishable under Section 420 of Indian Penal Code, should the Court to which such a complaint is presented for taking the cognizance of offence, confine itself merely to issue process under Section 138 of the Act (?) or secondly whether under such circumstances it is equally the duty of the Court also to see that alongwith the process to be issued for the alleged offence under Section 138 of the Act it also issues process under section 420 of the Code against the accused ?"

2. The respondent no.-1 Dipak Chimanlal Patel-Jigar Engineering Industries, GIDC, Vatva, Ahmedabad, filed a complaint before the learned Metropolitan Magistrate Court No. 7, Ahmedabad, against the petitioners-Dipendra G.Choksi and Ashaben G. Choksi-partners, Director & Managing Director respectively of Sunchem Enterprise, situated at Plot No.41, GIDC, Vatva, Ahmedabad, for the alleged offence punishable under section 138 of the Negotiable Instruments Act, 1881 (for short- "The Act"). According to the complainant, he is doing the business of manufacturing and selling ice. The petitioner nos. 1 and 2 (original accused nos. 1 and 2) purchased ice from him on several occasions. Accordingly it is the case of the complainant that the petitioners first purchased ice from him in between the period from 1-2-1989 to 28-2-1989 to the tune of Rs. 43,768-28; thereafter from 1-3-1989 to 31-3-1989 to the tune of Rs. 20,849-00; and from 1-4-1989 to 30-4-1989 to the tune of Rs. 2,810-80 PS on credit. In these three transactions, in all the accused purchased the goods worth Rs. 67,428-08 Ps. Towards these three transactions, according to the complainant, the petitioners gave him three different cheques of different dates, which he had deposited in the bank within the period of six months from the date on which it was drawn, however, the same were returned by the concerned bank with the endorsement 'refer to drawer'. Under the circumstances, when the complainant contacted the petitioners, they assured that the outstanding bill amounts would be paid up in few days with a request to present the cheque once again in the bank. This was done, however, once again all the aforesaid three cheques bounced-back with an endorsement 'refer to drawer' as there was no balance in the account of the petitioners. It is further alleged that despite the repeated demands, since the outstanding amounts towards bills were not paid, the complainant gave a Regd. Notice on 20-6-1989 to the petitioners requesting them to remit the outstanding bill amount with interest, giving further warning that if any default was committed in payment of

the money, the complainant would be constrained to file a criminal complaint. Despite service of the said notice, since the outstanding bill amount were not paid by the petitioners, the respondent No. 1 filed a complaint in the court of the learned Metropolitan Magistrate Court No. 7 Ahmedabad on 24-7-1989 against them, on the basis of which, the court issued the process for the alleged offence under section 138 of the Act, giving rise to the present petition under section 482 of the Criminal Procedure Code, 1973 inter alia praying for quashing the same.

3. This matter was called out yesterday twice, but Mr.A.S Kothari, learned advocate for the petitioner and Mr. S.V Raju, the learned advocate for the respondent No. 1 were absent, the matter was adjourned to today. Today also when the matter was called out, both the learned advocates were absent. It is under these circumstances that with the assistance of Mr. D.N.Patel, the learned APP, this court has heard and disposed of the same.

4. In order to find out whether there was any breach of compliance of any provision of sections 138 and 142 of the Act entitling the petitioners to pray for quashing and setting aside the process, it is indeed necessary first of all to advert to the said two sections, which read as under :

Sec. 138 Dishonour of cheque for insufficiency,
etc., of funds in the account :

Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in the part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act, be punished with imprisonment for a term which may extend to one year, or with fine which may extend to twice the amount of the cheque; or with both :

Provided that nothing contained in this

section shall apply unless :-

- (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity , whichever is earlier;
- (b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within fifteen days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
- (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or as the case may be, to the holder in due course of the cheque within fifteen days of the receipt of the said notice.

EXPLANATION : For the purposes of this section "debt or other liability" means a legally enforceable debt or other liability "

Sec.142: Cognizance of offences :
Notwithstanding anything contained in the Code of Criminal Procedure,1973 (2 of 1974) :

- (a) no court shall take cognizance of any offence punishable under section 138 except upon a complaint, in writing, made by the payee or, as the case may be, the holder in due course of the cheque ;
- (b) such complaint is made within one month of the date on which the cause of action arises under clause (c) of the proviso to section 138 ;
- (c) no court inferior to that of a Metropolitan Magistrate or a Judicial Magistrate of the first class shall try any offence punishable under section 138 "

4.1 Now examining the allegations made in the complaint in the light of the aforesaid provisions contained in sections 138 and 142 of the Act, it is indeed very clear that the requirements of the same are duly complied with. Bearing in mind first of all the clause (a) to proviso to section 138 of the Act, it is clear that all the three cheques were presented to the bank within the stipulated period of six month from the date on which they were drawn. Secondly, bearing in mind clause (b) of proviso to section 138 of the Act, it is further clear that the complainant was a 'holder in due course' and that he had made demand for the payment of the amount in question by giving a statutory notice in writing to the petitioners-drawers of the cheques within 15 days of the receipt of the information by him from the bank regarding return of the cheques as unpaid. Thirdly bearing in mind the proviso (c) to section 138 of the Act, the petitioners-drawers of the cheques in question have failed to make payment of the amount in question to the complainant within 15 days of the receipt of the said notice. Not only that but Fourthly, bearing in mind the provision regarding cognizance of offence engrafted in section 142 (a) of the Act, the respondent No. 1 who is 'a holder in due course' of the cheque has filed a complaint in writing, and, Fifthly, as further envisaged in section 142 (b) of the Act, the complaint was made within one month from the date on which the cause of action arose under clause (c) of the proviso to section 138 of the Act. In this view of the matter, there is indeed no legal flow on the basis of which a petitioner can be permitted to urge to quash the process.

5. However, the matter does not and cannot simply rest here, as on going through the petition, absolutely a lame attempt appears to have been made by twisting and harping upon the fact that there is no provision in the Act whereby a person in whose favour a cheque is drawn permitted to once again deposit the same having once already been rejected by the bank with the endorsement 'refer to drawer'. On the basis of this bald innovation, assertion, it is further faintly attempted to be urged by the petitioner that action of depositing the cheque in the bank second time was only with a view to by pass the provision of the Act in order to cover the lapse of not filing the criminal complaint in time after the cheques for the first time came to be refused with the endorsement 'refer to drawer'. Now entire angle of the petitioner raising these points is not only misconceived, fallacious and a misleading but mischievous too !! It is too well known to be stated even that even if on the first occasion once the bank returns the cheque with an

endorsement 'refer to drawer', the drawee is still legally entitled to once again deposit the very same cheque before the bank more particularly when he was so assured by the drawer of the cheque that the due amount will be deposited in the bank in few days and that the said cheque thereafter on second presentation would be honoured. In this view of the manner, once we find that there is indeed no such express statutory prohibition mandating the payee or the drawer of the cheque not to repeatedly present the cheque, once it was returned with endorsement 'refer to the drawer'; there is indeed nothing on the basis of which such hopeless plea can be allowed in favour of the petitioners !! Once this legal position is made clear and understood properly, it is quite trite to say that because the cheque in question having once returned with an endorsement 'refer to drawer' and was presented second time, it was done with a view to by-pass the provisions of the Act. Thus, having regard to the facts and circumstances of the case as stated in the complaint, the complaint is filed within the stipulated statutory period of one month from the date of arising of the cause of action. In this view of the matter, there is indeed nothing on the basis of which remotely even it can be said that sections 138 and 142 of the Act have not been complied with warranting quashing of the process.

6. Further still, the matter also does not and can not be simply permitted rest here. Looking to the nature of allegations in the complaint, it is very clear that the alleged offence is not only an offence punishable under section 138 of the Act, but the same also as well attract the ingredients of section 420 of the IPC. Accordingly, merely because for whatever reason the complainant inadvertently failed to add section 420 of the I.P Code for being cheated and particularly more when allegations in the complaint manifestly demonstrate that an offence under section 420 of IPC was committed that does not mean that the court which is bound to do justice is required to take into consideration only the alleged offence under section 138 of the Act and frame the charge accordingly only under the said section 138 ignoring altogether Section 420 of the IPC. In this view of the matter, assuming for the sake of argument that in such type of cases even if there are some such non-compliance of sections 138 and 142 of the Act, if the material facts alleged in the complaint otherwise prima facie disclose the offence under section 420 of IPC, then such dishonest person who dupes the otherside, turns his back, backing out from paying the cheque-amount, he has indeed no right or business to throw dust of technical points in the eyes of the Court and pray for quashing the process issued

against him/them conveniently taking unjust shelter under some non-compliance of section 138, 142 of the Act. The person having committed a wrong can not be allowed to wriggle out of the clutches of the law, denying justice to the aggrieved citizen who on being duped knocks the door of the Court for justice. In this view of the matter, whenever any complaint is filed merely and only for the alleged offence under Section 138 of the Act then even it is the foremost duty of the learned Magistrate to carefully screen and examine each and every allegation in the the complaint and if there is/are a manifest circumstances prima facie constituting an offence of cheating under I.P.Code, then while taking cognizance and issuing the process he should see to it that it is not confined only to Section 138 of the Act but shall also issue process under Section 420 of the I.P Code as well. The learned Magistrates should know and know for ever and accordingly bear in mind that doing justice is not a mere a matter of formality, but it is a matter of substance, where person committing offence under several acts should be duly served with processes for all the alleged offences.

7. In view of the aforesaid discussion, since there is no substance in the petition, the same deserves to be dismissed. The learned Magistrate is directed to add Section 420 of I.P Code in this case and conduct the trial accordingly and as expeditiously as possible.

8. In the result, this petition fails and is dismissed. Ad-interim relief granted earlier stands vacated. The learned Magistrate is directed to proceed with the trial by giving notice to the complainant and accused. Rule discharged.

Joshi/Pt*